UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

IN RE: LAWNMOWER ENGINE HORSEPOWER MARKETING AND SALES PRACTICES LITIGATION	**Case No. 2:08-md-01999** **Judge Lynn Adelman**
THIS DOCUMENT RELATES TO: All Actions	

SCOTT KIMBALL III'S RESPONSE TO THE MOTION FOR AN APPEAL BOND

Without any legal or factual basis, Plaintiffs demand the Court impose a punitive, $80,000 appellate bond upon counsel for Scott Kimball III because that attorney has experience representing class action objectors. The Court should deny Plaintiffs' motion – it imposes an improper discriminatory burden, it misapprehends the standards imposed by the Seventh Circuit, and it cites evidence which directly contradicts its conclusion that undersigned counsel's law firm is a so-called "Professional Objector."

In addition, the Plaintiffs' motion is procedurally improper – it requests that the Court impose a Rule 7 appellate bond on **counsel**, even though the rule does not allow such an imposition. Plaintiffs' motion incorrectly seeks to usurp the function of the appellate court in determining appellate merits, and it imposes upon the objectors costs which should not count for an appellate bond – particularly, costs which will occur anyway, due to the appeal of another Defendant from the Court's decision. Plaintiffs fail to offer any evidence to support their motion, and they rely upon purported presumptions which do not exist. Accordingly, for all these reasons, the Court should deny the Plaintiffs' request for an appellate bond.

FACTUAL AND PROCEDURAL POSTURE

The Court in this case overruled the objections filed by Scott Kimball III ("Mr. Kimball") and approved the proposed class settlement on August 16, 2010. Defendant Husqvarna Outdoor Products, Inc. ("Husqvarna") filed its Notice of Appeal on September 14, 2010. *See Docket Number 418.* On September 16, 2010, Mr. Kimball also filed a Notice of Appeal. *See Docket Number 425.* Mr. Kimball is represented by Lindow Stephens Treat, LLP (collectively, "Lindow Stephens Treat").

Plaintiffs now demand that Lindow Stephens Treat on behalf of its client Mr. Kimball post an $80,000 bond, allegedly because Lindow Stephens Treat is a "Professional Objector." *See Brief in Support of Motion for an Appeal Bond ("Plaintiffs' Brief") at 1.*[1] Plaintiffs have no basis to claim that Lindow Stephens Treat is a "Professional Objector," and, in fact, their argument regarding "Professional Objector" status is both contrary to law and contrary to the evidence they cite.

Plaintiffs also claim that having Lindow Stephens Treat and other class action objectors pursue this appeal will lead to massive disruption and additional costs which will need to be borne by the Plaintiffs. *Brief at 8-12.* Plaintiffs fail to explain, however, how class objectors' appeals are the cause of disruption ***since Husqvarna is also pursuing an appeal.*** *See Docket Number 418.* In other words, the delays arising from the appellate process ***would occur regardless of Mr. Kimball's appeal***

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[1] Plaintiffs' Brief in Support asks for different relief that their Motion. Plaintiffs' Motion seeks to have the Court order Mr. Kimball to pay an $80,000 bond. *See Motion for Appeal Bond, Docket Number 454.* Plaintiffs' Brief, on the other hand, asks the Court to impose the $80,000 bond upon Lindow Stephens Treat and other "Professional Objectors." *Plaintiffs' Brief at 1 et seq.* The Brief makes plain that it is Lindow Stephens Treat which is supposedly a "Professional Objector" – not Mr. Kimball. *See Id.* The Brief never mentions why ***Mr. Kimball*** should be ordered to pay an appeal bond. *Id.* Accordingly, to the extent that Plaintiffs seek relief directly against Mr. Kimball, it should be denied.

ANALYSIS

District courts have discretion to impose appellate bonds in appropriate cases. *See* FED. R. APP. PRO. 7. However, the requirements for a bond are appropriate only if "reasonably tailored" and applied "uniformly and non-discriminatorily." *Lindsey v. Normet*, 405 U.S. 56, 79, 92 S.Ct. 862, 877 (1972).

I. PLAINTIFFS BONDING REQUEST IS DISCRIMINATORY.

Plaintiffs ask the Court to adopt a bonding rule which discriminates against experienced counsel. *Brief at 1, 6.* Specifically, Plaintiffs request the Court impose a bond upon law firms such as Lindow Stephens Treat because those law firms have experience handling class action appeals by objectors. *Brief at 6.* Plaintiffs' argue that some law firms should be subjected to more stringent bonding requirements than other lawyers because of their experience in other cases. *Id.* This is precisely the sort of discriminatory practice which is forbidden. *See Lindsey*, 405 U.S. at 79, 92 S.Ct. at 877.

II. LINDOW STEPHENS TREAT IS NOT A "PROFESSIONAL OBJECTOR"

Under the rules established by the Seventh Circuit, Plaintiffs in this case have utterly failed to establish that Lindow Stephens Treat filed an improper objection as a "Professional Objector." While the Plaintiffs spend a great deal of time informing the Court about other cases in which Lindow Stephens Treat has appeared, multiple representation of class action objectors in other venues does not constitute just cause for imposing punishment on a law firm or its clients.

A. Lindow Stephens Treat does not qualify as a Professional Objector.

According to the Seventh Circuit, the essence of a 'Professional Objector' is a person who files an objection not in the hope of improving a class action settlement, but rather, to cause a delay in order to extort a payment. *Vollmer v. Selden*, 350 F.3d 656, 659-60 (7th Cir. 2003). It is not wrong for an attorney representing a class action objector to seek payment, provided that the attorney has brought a benefit to the class. *Id.* It is impermissible to use the fact that an attorney has filed multiple class action appeals in previous litigation to impose a penalty or sanction. *Id.*

In *Vollmer*, the Seventh Circuit explained that class action objectors – and their experienced counsel – play a critical role in assuring the fairness of class action settlements:

> [Class action objectors] counteract any inherent objectionable tendencies by reintroducing an adversarial relationship into the settlement process and thereby improving the chances that a claim will be settled for its fair value. [Objectors] have the potential to play this important role even in the numerous valid class actions where each plaintiff is seeking to be compensated only by a few dollars. The slightness of individual recovery does not make the counsel's purpose invalid nor his role as objector less vital.

Id. It is ***always*** proper for a lawyer to file a non-frivolous objection with the purpose of increasing the value of a class action settlement to members of the class. *Id.*

A prior history of representing class objectors in other cases is not evidence of "professional objector" status. *See Id. at 662-64*. Instead, 'professional objector' status must be shown by demonstrating that the objector has engaged in behavior in the present case which suggests the objection serves only to extort a settlement. *See Id.* For example, filing "canned" objections to a class action settlement through "generic, unhelpful protests" to obtain monetary compensation is a sign of a professional objector. *Devlin v. Scardelletti*, 536 U.S. 1, 23, 122 S.Ct. 2005, 2017 (2002) (Scalia, J., dissenting); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 942, 973-974, and nn. 17-18 (E.D. Tex. 2000).

Here, the objections filed by Lindow Stephens Treat are not "canned" – indeed, they are tailored to the unique facts of the present suit. *See Docket Number 425.* The only evidence Plaintiffs put forward of Lindow Stephens Treat's purported status as a "Professional Objector" is that the firm has represented other class action objectors. *Plaintiffs' Brief at 6.* The fact that an attorney has represented objectors in other cases *is not evidence of being a professional objector.* *See Vollmer*, 350 F.3d at 662-63. Accordingly, as there is no valid evidence of wrongdoing by Lindow Stephens Treat, the motion for an appellate bond should fail. *Id.*

B. *Schipper* illustrates the good faith of Lindow Stephens Treat.

Plaintiffs also allege that the conduct of Lindow Stephens Treat in *Schipper v. TXU Corp.*, No. 3:07-CV-1281-G (N.D. Tex. 2007), establishes that the firm acts like a "Professional Objector." *Plaintiffs' Brief at 6. Schipper* establishes the exact opposite of what Plaintiffs contend.

In *Schipper*, class counsel improperly used a pending state court derivative action to keep a federal district court from reviewing their fee application. On behalf of an objector, the firm of Lindow Stephens Treat protested the settlement, and *expressly proposed* that the trial court de-certify the class, ***even though such decertification would automatically exclude the Firm from recovering attorneys' fees***. *See Exhibit A, Schipper Reply Brief at 9-10.* In response to the objection, the judge in *Schipper* found that class counsel had "not presented [the attorneys' fees issue] with the requisite candor that the court expects of attorneys' practicing before it." *See Ex. B, Schipper Order at 2.* The *Schipper* court then forced class counsel to disgorge over $235,141.40 of ill-gotten fees which had been obtained by abusing the federal process. *Id. at 7.*

The mark of a professional objector is the filing of meritless, generic objections for the purpose of extorting money from a class action settlement. *See Devlin v. Scardelletti*, 536 U.S. at 23, 122 S.Ct. at 2017 (Scalia, J., dissenting); *Vollmer*, 350 F.3d at 662-63; *Shaw*, 91 F.Supp.2d at 973-974. However, in *Schipper*:

- The objections filed by Lindow Stephens Treat were not generic, but instead, reflected the real concern by an individual with potential health claims that his right of recovery would be limited by the class action settlement. *See Exhibit A, Schipper Reply Brief at 7-8.*

- The objections filed by Lindow Stephens Treat were not frivolous, since they exposed wrongdoing by class counsel. *Ex. B, Schipper Order at 2.*

- The objections filed by Lindow Stephens Treat were not primarily to obtain a monetary benefit for the firm, since the firm requested relief which, if granted, would have resulted in no payment of fees. *See Exhibit A, Schipper Reply Brief at 9-10.*

In sum, *Schipper* shows that Lindow Stephens Treat does not qualify as a Professional Objector, because its objections were not generic, not frivolous, and expressly suggested a method for the district court to avoid paying the firm any fees. The Court accordingly should deny Plaintiffs' request for a finding that *Shipper* establishes that Lindow Stephens Treat qualifies as a "Professional Objector."

III. THERE IS ABSOLUTELY NO BASIS TO REQUIRE *COUNSEL* TO POST AN APPEAL BOND.

Plaintiffs without basis move that the Court require ***counsel*** in this matter to post an appeal bond under Appellate Rule 7, claiming that counsel constitute "Professional Objectors" because they are experienced in filing objections. There is no legal basis that would allow the Court to require ***counsel*** to post an appeal bond.

Federal Rule of Appellate Procedure 7 undoubtedly gives district courts discretion, in the proper case, to require an ***appellant*** to post a bond on appeal:

> In a civil case, the district court may require an ***appellant*** to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.

FED. R. APP. PRO. 7. Plaintiffs, however, do not ask the Court to impose an appeal bond upon the ***appellants*** in this case. *See Plaintiffs' Brief at 1*. Instead, the Plaintiffs' ask the Court require that ***counsel*** post a bond. *Id.* There is no rule or statute which permits a district court to impose bond on counsel, or permits a district court to impose bond because a party chose to be represented by one particular set of lawyers over another. *See* FED. R. APP. PRO. 7. The Court accordingly should deny the Plaintiffs' motion.

IV. IT WOULD BE AN ABUSE OF DISCRETION TO REQUIRE AN APPEAL BOND FROM THE APPELLANTS IN THIS CASE.

It is improper to use a Rule 7 appellate bond to impose a great burden on an objector's right to appeal a class action settlement. *Vaughn v. American Honda Motor Co., Inc.*, 507 F.3d 295, 300 (5th Cir. 2007). Improperly high appellate bonds discourage meritorious appeals and wrongfully insulate a class settlement from appellate scrutiny. *Id.* The concern regarding high appellate bonds is particularly acute when there is a lack of evidence that the objector is using the appeal to leverage compensation for themselves or their counsel. *See Id.*

Following these principles, it has been found to be an abuse of discretion for a trial court to impose a large bond on a class action objector as a means of compensating the class "for the detrimental impact of an appeal." *Id.* Likewise, it is improper for the district court to impose a high appellate bond based upon a belief that the appeal ultimately will be unmeritorious – such a sanction falls within the purview of the appellate court, not the trial judge. *Id.*

A. Plaintiffs have no basis to request an appeal bond.

Plaintiffs request that the Court impose a bond to reflect the Plaintiffs' belief that the appeals are without merit, but this is not a basis upon which to order an appellate bond.[2] *Vaughn*, 507 F.3d at 300. Plaintiffs likewise request that the Court impose a bond to reflect the detrimental impact of the appeal on the class. *Brief at 8-10.* Again, this is not a basis upon which an appellate bond may be ordered. *Vaughn*, 507 F.3d at 300. Since the Plaintiffs have not come forward with any evidence that the objectors are engaged in improper conduct, it is improper to impose a high appellate bond upon the objectors. *Id.*

B. The appellate costs are not the fault of the objectors.

Moreover, Plaintiffs in the present case blame objectors for disrupting the class action settlement – but that disruption would occur regardless of the presence of the objectors. Defendant Husqvarna Outdoor Products Inc. filed its Notice of Appeal on September 14, 2010. *See Docket Number 418.* The appeal by Husqvarna will, by itself, cause additional administrative expenses. *See Brief at 8.* The appeal by Husqvarna will also cause a delay in the disbursement of settlement funds. *Id. at 9.* The appeal by Husqvarna will also cause the Plaintiffs to incur additional legal fees. *Id. at 11.* Given the pending appeal by Husqvarna causes the problems of which the Plaintiffs complain, it is unfair to impose upon the objectors or their counsel a bond – particularly, an onerous bond of $80,000.

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[2] In addition, Plaintiffs also seem to misunderstand the nature of the Objectors' appeal. Plaintiffs claim that it is unlikely that the objectors' appeal will prevail because the Courts decision to certify the class and its decision regarding attorneys' fees is governed by the abuse-of-discretion standard. *Motion at 5.* However, the objectors contend that the Court used the wrong standard in awarding attorneys' fees and in overruled the objections regarding collusion and inter-class conflicts. Determining whether the Court applied the proper standard will be reviewed by the appellate court *de novo*. *Oddi v. Ayco Corp.*, 947 F.2d 257, 261 (7th Cir. 1991).

V. IT WOULD BE AN ABUSE OF DISCRETION TO INCLUDE ATTORNEYS' FEES IN THE BOND.

There is no basis for the Plaintiffs to request that the district court include attorneys' fees in its calculation of the appellate bond. While there is a conflict between the circuits as to whether attorneys' fees may be included in an appellate bond in some circumstances, no circuit would authorize the inclusion of attorneys' fees in this case.

At least two circuits have taken the position that an appellate bond under Rule 7 should not include attorneys' fees as part of the bond. *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777 *3 (3d Cir. June 10, 1997) ("[W]e conclude that Rule 7 does not authorize a bond to cover estimated costs of attorneys' fees."); *In re Am. President Lines, Inc.*, 779 F.2d 714, 716 (D.C.Cir.1985) ("The costs referred to [in Rule 7] are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal.")

Four circuits, on the other hand, have adopted the rule that attorneys' fees may be included in an appellate bond when the underlying lawsuit contains a fee-shifting statute. *Azizian v. Federated Dept. Stores, Inc.*, 499 F.3d 950, 953 (9th Cir. 2007); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817 (6th Cir.2004); *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1333 (11th Cir.2002); *Adsani v. Miller*, 139 F.3d 67 (2d Cir. 1998). However, in all of these cases, the fee-shifting statute specifically allowed the prevailing party to demand attorneys' fees from the non-prevailing party. *See, e.g., Azizian*, 499 F.3d at 959 (no fees included in bond because Clayton Act only allows plaintiffs to recover fees); *Cardizem*, 391 F.3d at 819 (allowing fees to be included because state statute was written to allow prevailing defendant to recover fees).

Here, Plaintiffs claim recovery of attorneys fees under the provisions of civil RICO, 18 U.S.C. § 1964(c). This statute, like the Clayton Act, does not allow defendants to recover attorneys' fees. Even if the Court in the present case rules that attorneys' fees may in some circumstances be included in the calculation of an appellate bond, the Court still should not include attorneys' fees in the calculation of the bond in this case, because there is no statutory justification for attorneys' fee inclusion. *Azizian*, 499 F.3d at 959.

VI. THERE IS NO PRESUMPTION REGARDING ASSETS.

Plaintiffs in this case erroneously claim that *Adsani*, 139 F.3d at 79, and *In re AOL Time Warner, Inc. Sec. & ERISA Lit.*, 2007 WL 2741033 at *2 (S.D.N.Y. 2007), for the proposition that the failure to file a statement of assets means that the district court can presume the objector has the wherewithal to post an appellate bond. *Brief at 4.* Plaintiffs have badly misread both of these cases.

In *Adsani*, it was established at the trial court level that the party filing the appeal was not a U.S. citizen and had no domestic assets. *Adsani*, 139 F.3d at 79. Moreover, she had already demonstrated that she had the ability to pay the requisite bond – after all, through virtually the entire litigation, she had posted a $50,000 bond. *Adsani*, 139 F.3d at 69-70, 79. On this record, the *Adsani* court found that plaintiff "failed to adduce" evidence of her inability to pay. *Id.* Given that Lindow Stephens Treat and Scott Kimball III are all citizens of the United States, and given that they have not been previously asked to post a bond, *Adsani* has no application.

Likewise, *AOL Time Warner*, 2007 2741033 at *2 is inapposite. In *AOL Time Warner*, the district court considered whether a company ***which claimed a multi-million dollar business contract with the defendant had the ability to pay an $800 bond.*** *Id.*

Nothing in the *AOL Time Warner* decision, however, addresses the obvious impact of an $80,000 bond, which is what the Plaintiffs seek in this case. *Id.*

VII. THERE IS NO PROOF THAT AN $80,000 BOND IS NECESSARY

Finally, the Court should deny the request for an $80,000 appellate bond from Lindow Stephens Treat because there is no evidence that such a massive bond is necessary. Plaintiffs offer no evidence that an $80,000 bond is necessary or actually reflects the costs they may incur on appeal. *Brief at 1-12.* Instead, Plaintiffs offer merely a guess as to what the proper value of the bond will be, and point out that bonds in other cases have been large. *See Brief at 12.* This is not a reasonable factual basis upon which to support the imposition of an $80,000 bond. *See Lindsey*, 405 U.S. at 79, 92 S.Ct. at 877 (bond must be reasonably tailored).

PRAYER

The Court for the foregoing reasons should deny the request by Plaintiffs for an appellate bond.

Respectfully submitted,

LINDOW ▪ STEPHENS ▪ TREAT LLP

By: s/ Mark A. Lindow
Mark A. Lindow
Texas State Bar No. 12367875
Theodore Schultz
Texas State Bar No. 00797393
600 Navarro Street, Sixth Floor
San Antonio, Texas 78205
(210) 227-2200 [Telephone]
(210) 227-4602 [Telecopier]

Counsel for Objector,
Scott Kimball III.

CERTIFICATE OF SERVICE

A copy of the foregoing was filed on the 25th of October, 2010 and served on all parties through the Court's electronic docketing system.

By: s/ Mark A. Lindow
Mark A. Lindow